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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/051,584	01/18/2002	Parimal Vadhar	D-43489-01 US	9718

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EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 08/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/051,584

Applicant(s)

VADHAR ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 June 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 23 and 25-29 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 23, 25-29 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. The Amendment Filed June 10, 2005 has been added. Claims 1-22,24 have been cancelled, and claims 25-29 have been added. Claims 23,25-29 remain pending.

Claim Rejections - 35 USC § 102

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 23,25-28 are rejected under 35 U.S.C. 102(b) as being anticipated by Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751).

4. Regarding claims 23, 26-28, Pockat et al. teach placing a food product on a bottom web that comprises a sealant layer of 60-80% EVA and 10% *Poly*-propylene, which is a homopolymer of propylene, and an oxygen layer of EVOH as recited in claim 28, sealing a top web, which comprises an ethylene/alpha-olefin copolymer (i.e. LDPE and LLDPE) and an oxygen barrier such as nylon (i.e. polyamide) as recited in claim 27, to the bottom web that is attached to a support member, such as nylon (or polyamide as recited in claim 26), and drawing a vacuum to form a vacuum skin package that provides an easy peel seal (Column 3, line 49 to Column 3, line 28, Column 5, line 5 to column 6, line 22, the top web layers are defined in Column 7, lines 64-68 and Claim 2, the support layer is defined in Table 1, claim 1 and shown in Figure 4). All of these materials are microwaveable evidenced by Genske et al. who also teach easy peel lid stock for microwaveable structures (Abstract, Column 2, lines 48-57, Coplumn 4, line 20 to Column 6, line 61). Note: the claim recites "a sealant layer consisting

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essentially of" the EVA and the homopolymer/copolymer PP, the claim also recites "the bottom web of the vacuum skin package comprises". Thus, the bottom web may *comprise* components in addition to the EVA and PP.

5. Regarding claim 25, the bottom web of skin package of Pockat et al. *comprises* (i.e. has at least one) single layer adapted to be adhered to the sealant layer of the top web.

Claim Rejections - 35 USC § 103

6. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

7. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pockat et al. (US 5023121) evidenced by Genske et al. (US 5407751) as applied to claims 23,25-28 above, further in view of Shibata et al. (US 4429079).

8. Pockat et al. teach the top web with a sealant layer comprising ethylene/alpha olefin copolymer, such as LDPE, and an outer gas-barrier layer of polyamide, but are silent in teaching ethylene/octene-1 polymer. Shibata et al. also teaches adhesive layers compatible with polyamides for food packages, but teaches some low-density polyethylenes have shown various problems such as a very narrow seal temperature range, poor seal strength, and poor flexural resistance. Shibata et al. teach a preferred ethylene/alpha olefin copolymer comprises ethylene/octene-1 copolymer because it does not show the problems encountered with conventional low-density polyethylenes (Column 1, line 15 to Column 2, line 20). Therefore, it would have been obvious to

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modify Pockat et al. and include ethylene/octene-1 polymer since Shibata et al. teach ethylene/octene-1 copolymer overcomes the problems with sealing and flexural properties of conventional low density ethylene/alpha olefin copolymers.

Response to Arguments

9. Applicant's arguments filed June 10, 2005 have been fully considered but they are not persuasive.

10. The Examiner agrees with Applicant's interpretation of Pockat et al. in that the sealant layer are separately provided and blended to form a *single* seal layer. However, claim 23 does recite a bottom web *comprises*, which is an open transitional phrase, and *consisting essentially of* does not exclude any other component, such as PB from being present. According to MPEP 2111.03:

The transitional phrase "consisting essentially of" limits the scope of a claim to the specified materials or steps "and those that do not materially affect the basic and novel characteristic(s)" of the claimed invention. In re Herz, 537 F.2d 549, 551-52, 190 USPQ 461, 463 (CCPA 1976) (emphasis in original) (Prior art hydraulic fluid required a dispersant which appellants argued was excluded from claims limited to a functional fluid "consisting essentially of" certain components. In finding the claims did not exclude the prior art dispersant, the court noted that appellants' specification indicated the claimed composition can contain any well-known additive such as a dispersant, and there was no evidence that the presence of a dispersant would materially affect the basic and novel characteristic of the claimed invention. The prior art composition had the same basic and novel characteristic (increased oxidation resistance) as well as additional enhanced detergent and dispersant characteristics.). "A consisting essentially of" claim occupies a middle ground between closed claims that are written in a consisting of format and fully open claims that are drafted in a comprising format." PPG Industries v. Guardian Industries, 156 F.3d 1351, 1354, 48 USPQ2d 1351, 1353-54 (Fed. Cir. 1998). See also Atlas Powder v. E.I. duPont de Nemours & Co., 750 F.2d 1569, 224 USPQ 409 (Fed. Cir. 1984); In re Janakirama-Rao, 317 F.2d 951, 137 USPQ 893 (CCPA 1963); Water Technologies Corp. vs. Calco, Ltd., 850 F.2d 660, 7 USPQ2d 1097 (Fed. Cir. 1988). For the purposes of searching for and applying prior art under 35 U.S.C. 102 and 103, absent a clear indication in the specification or claims of what the basic and novel characteristics actually are, "consisting essentially of" will be construed as equivalent to "comprising." See, e.g., PPG, 156 F.3d at 1355; 48 USPQ2d at 1355 ("PPG could have defined the scope of the phrase consisting essentially of" for purposes of its patent by making clear in its specification what it

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regarded as constituting a material change in the basic and novel characteristics of the invention."). See also > AK Steel Corp. v. Sollac, 344 F.3d 1234, 1240-41, 68 USPQ2d 1280, 1283-84 (Fed. Cir. 2003) (Applicant's statement in the specification that "silicon contents in the coating metal should not exceed about 0.5% by weight" along with a discussion of the deleterious effects of silicon provided basis to conclude that silicon in excess of 0.5% by weight would materially alter the basic and novel properties of the invention. Thus, "consisting essentially of" as recited in the preamble was interpreted to permit no more than 0.5% by weight of silicon in the aluminum coating.);< In re Janakirama-Rao, 317 F.2d 951, 954, 137 USPQ 893, 895-96 (CCPA 1963). If an applicant contends that additional steps or materials in the prior art are excluded by the recitation of "consisting essentially of," applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant's invention. In re De Lajarte, 337 F.2d 870, 143 USPQ 256 (CCPA 1964). See also Ex parte Hoffman, 12 USPQ2d 1061, 1063-64 (Bd. Pat. App. & Inter. 1989) ("Although consisting essentially of' is typically used and defined in the context of compositions of matter, we find nothing intrinsically wrong with the use of such language as a modifier of method steps. . . [rendering] the claim open only for the inclusion of steps which do not materially affect the basic and novel characteristics of the claimed method. To determine the steps included versus excluded the claim must be read in light of the specification. . . . [I]t is an applicant's burden to establish that a step practiced in a prior art method is excluded from his claims by consisting essentially of' language.")

11. It is noted that there is no evidence of record and no clear indication in the specification or claims to suggest that the presence of polybutylene, as taught by Pockat et al., would materially change the basic characteristics of Applicant's sealing layer (e.g. easily peelable seal for a vacuum sealed and microwavable package).

Conclusion

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

13. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not

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mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 8:00AM-4:30PM M-F.

15. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

16. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
Art Unit 1761


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